

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2006 Session

D. E. RYAN v. METROPOLITAN GOVERNMENT

Appeal from the Circuit Court for Davidson County
No. 00C-3050 Thomas Brothers, Judge

No. M2005-00761-COA-R3-CV - Filed on September 29, 2006

In this zoning dispute, the local government appeals the assessment of attorney fees pursuant to the Tennessee Equal Access to Justice Act, contending the plaintiff was not eligible to recover attorney fees because he failed to prove he was a small business, as defined in Tenn. Code Ann. § 29-37-103(3). Finding the local government was not afforded a reasonable opportunity to challenge the plaintiff's contention he qualified as a small business, we reverse and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

J. Brooks Fox and John L. Kennedy, Nashville, Tennessee, for the appellant, Metropolitan Government of Nashville and Davidson County.

George A. Dean, Nashville, Tennessee, for the appellee, D. E. Ryan.

OPINION

Plaintiff, D. E. Ryan, filed a zoning application in 2000 to change the zoning on property classified as residential so that he could "re-open" a Dairy Dip business he had previously operated on the property in the 1970s. Following years of operating a Dairy Dip business on the property, Plaintiff rezoned the property in 1979 for office use. Nineteen years later, in 1998, Plaintiff sought and obtained another rezoning, this time to a residential classification. Then in 2000 Plaintiff filed the application that is at issue, to have the property rezoned in order to reopen the Dairy Dip on the property.

The Board of Zoning Appeals granted Plaintiff's application in May of 2000 only to *sua sponte* revisit that decision and rescind its approval. Plaintiff appealed the Board's action by filing

a Complaint with the Circuit Court of Davidson County.¹ The Circuit Court reversed the decision of the Board finding the Board was without jurisdiction to reconsider its earlier decision. The Metropolitan Government appealed. In that appeal, the first of two appeals in this action, we affirmed the Circuit Court and remanded the matter.

On remand, Plaintiff filed a Motion for Attorney fees. The motion was supported by three affidavits. The Metropolitan Government opposed the motion and requested the opportunity to take discovery on the issue of Plaintiff's eligibility to recover attorney fees. The Circuit Court awarded Plaintiff \$10,000 in attorney fees under the Tennessee Equal Access to Justice Act based only on the three affidavits without conducting an evidentiary hearing that would have allowed the Metropolitan Government an opportunity to challenge Plaintiff's evidence.

The Metropolitan Government perfected this appeal, contending Plaintiff did not prove he was a small business and therefore was not eligible to recover attorney fees under the Tennessee Equal Access to Justice Act.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is de novo, and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Issues of law are reviewed de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

The intent of the Tennessee Equal Access to Justice Act is to offer small businesses an opportunity for adequate legal representation in a dispute with a local government "in any administrative hearing in the operation of such business and, where necessary, in the resulting appeal process." Tenn. Code Ann. § 29-37-102. If the small business prevails in the dispute with the local government, it may recover up to \$10,000 in reasonable and actual fees and other expenses. Tenn. Code Ann. § 29-37-104(a)(1).

There are two limiting factors that pertain to the facts at issue. One is the plaintiff must be a small business as defined in the Act. Tenn. Code Ann. § 29-37-104(b)(2). The second is the action of the local government must have been found to have been arbitrary and capricious or must have been brought in bad faith for the purpose of harassment. Tenn. Code Ann. § 29-37-104(b)(2). The

¹The Circuit Court remanded the case to the Board, after which the Board again denied the rezoning request. Plaintiff then renewed its appeal to the Circuit Court

burden of proof is on the small business to establish each factor by a preponderance of the evidence. Tenn. Code Ann. § 29-37-104(b)(2).

The issue of whether the action of the local government was arbitrary or capricious was decided favorably to Plaintiff in the first appeal. *See Ryan v. Metro. Gov't of Nashville & Davidson County*, No. M2003-01625-COA-R3-CV, 2004 WL 1944131 (Tenn. Ct. App. Aug. 21, 2004). Therefore, the only issue remaining is whether Plaintiff qualifies as a small business for purposes of the Act. If Plaintiff is not a small business, as that term is defined in Tenn. Code Ann. § 29-37-103(3), then he is not eligible to recover his attorney fees.

The statute defines "small business" as a business entity that is either a "natural person licensed by one (1) or more state agencies or boards and whose claim under this chapter arises from such licensing on the date the civil action was filed," or a "sole proprietor of an unincorporated business" who has annual receipts that do not exceed one million dollars in the twelve months preceding the filing of the civil action and who did not employ more than fifteen full-time employees at the time the civil action was filed. Tenn. Code Ann. § 29-37-103(3)(A).

The Circuit Court found Plaintiff was a small business. That decision was based on the affidavits attached to Plaintiff's motion. Three affidavits were attached to the motion, two of which concerned the amount of the attorney fees. The third affidavit, which was an affidavit of Plaintiff, is the only one that addressed the issue of whether Plaintiff was a small business.

It is undisputed that Plaintiff owns a parcel of land, but being an owner of property is not sufficient to qualify as a small business. *See Gregory v. Metro. Bd. of Zoning Appeals of the Metro. Gov't of Nashville & Davidson County*, No. 01-A-01-9009-CH00331, 1991 WL 17174, at *6 (Tenn. Ct. App. Feb. 15, 1991). It is also undisputed that Plaintiff operated a business on the property prior to 1990, but there is no evidence that Plaintiff was operating a business at the commencement of this zoning dispute. It is evident from reading the Act that the Act requires the "small business" be an operating business² at the commencement of the action; yet, there is no affirmative evidence in the record that Plaintiff was operating a business at any time relevant to this action.

Plaintiff's affidavit provided little information relevant to the issue other than one conclusory opinion – that he was a small business – and two facts which fail to provide affirmative evidence to support a finding that Plaintiff was operating a business at any relevant time. The two facts merely state that Plaintiff had "no employees" and his receipts were "under one million dollars."

Affidavits are to be made on personal knowledge and shall set forth such facts as would be admissible in evidence. *See Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498 (Tenn. 1978)

²Tenn. Code Ann. § 29-37-102 specifies the intent of the Act is "to offer small business an opportunity for adequate representation in any administrative hearing *involving the operation of such business*. . . ." The Act further signifies the requirement the small business be an "operating business" with one of the definitions of a small business being a person who is licensed by one or more state agencies or boards and whose claim arises from such licensing. Tenn. Code Ann. § 29-37-103(3)(A).

(citing Tenn. R. Civ. P. 56.05). If an opinion is rendered in an affidavit, the affidavit shall affirmatively establish that the affiant is competent to render the opinion. *Id.*; *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Plaintiff’s statement in his affidavit that he is a “small business” is a mere legal conclusion, one Plaintiff is not qualified to make. *See Aghili*, 958 S.W.2d at 787-88.³ The only facts relevant to the “small business” issue are that Plaintiff has “no employees” and his receipts were “less than one million dollars.” These facts standing alone fail to prove that Plaintiff was operating a business. This is because a person who is not in business also has no employees and receipts less than one million dollars.

In its brief, the Metropolitan Government contended it was entitled to an evidentiary hearing to challenge Plaintiff’s claim that he qualified as a small business. We agree. Because Plaintiff’s entitlement to recover attorney fees and costs under the Act is a fact-driven question, we find it appropriate to remand the issue to afford the parties the opportunity to have an evidentiary hearing to determine whether Plaintiff qualifies as a small business as that term is defined in the Tennessee Equal Access to Justice Act, Tenn. Code Ann. § 29-37-101 et seq.

We, therefore, reverse the judgment of the trial court and remand for further proceedings consistent with this opinion. Costs of appeal are assessed against Plaintiff, D.E. Ryan.

FRANK G. CLEMENT, JR., JUDGE

³In *Aghili*, Mr. Tarahian testified in his deposition that he was qualified to perform Islamic blessings. To refute that, Mr. Aghili submitted an affidavit wherein he asserted that an Islamic “blessing is not recognized in the State of Tennessee as a legal marriage.” The *Aghili* court found the affidavit inadmissible because the statement constituted a legal conclusion that Mr. Aghili is not qualified to make. *Aghili v. Saadatnejadi*, 958 S.W.2d 787.